

Minutes for Meeting #11 Government Industry Advisory Panel (13-14 Dec 16)

Section 813, FY16 NDAA, Rights in Technical Data

ATTENDEES:

- **Panel Members:** Richard Ginman (Chair), Richard Gray, Charles Harris, Kelly Kyes, James McEwen, Roger Hamerlinck, Sean O'Brien, Dora Hancock, Joseph Gordon, Bill Elkington, Alison Brown, Carl Rapp
- **Support Staff:** LTC Andrew Lunoff (DFO), Mike Canales
- **Public:** Mark Borowski, Nancy Kremers, Josh Krotec, Jon Etherton, Karen Wilson, David Drabkin, Alexis Ross, Casey Blackwelder
- **Public (On Telecon):** George Winborne, James Haag, Yoed Cameron Santos, Col Muha, Joel Van Over, Nicholas Florio, Bill Decker, Jane Barrow, Barry Edelberg, Kevin O'Brien, John Pepescu

INTRODUCTIONS

- Introduced everyone – including those on the telephone
- Panel received written public comments from the Aeronautical Repair Station Association and the Aerospace Industries Association which are posted under the FACA Database site listed below

ADMIN NOTES

- No presentations occurred during this session. The panel focused on finalizing tension points between government and industry that were identified in received public comments and briefings.
- The resulting documents can be found at the following FACA database location under the titles of "Tension Point Assignment Summary" and "2320 Revision and Tension Point Summary" (pages 8-10):

<https://database.faca.gov/committee/meetingdocuments.aspx?flr=147543&cid=2561>

- Determined which members would brief the Section 809 Panel
- Government member unable to continue to participate due to new position (Mr. Tom Dee)

PANEL DISCUSSION ON TENSION POINT TOPICS:

Topics came up during discussion on identifying tension points at statutory or regulatory in nature:

- 2.i. Loss of (sustainment) support: (Source of all tension could be in sustainment and depot work)

- Need to establish better definition of detailed manufacturing and process data (DMPD)
- 3.d. Need for government flexibility to use existing tools (Competition in Contracting Act (CICA))
 - Don't have requirement to compete when can compete
 - If government does not have the rights to compete, then they can't compete
 - Recommendation: All DIDs have two extra blocks
 - One for desired type of data
 - Another for desired data rights
 - Establish two ICDs with limited and unlimited rights

Public Comment, Mr. Bill Decker, Defense Acquisition University

- Teaching intellectual property and technical data rights needs to happen on a regular basis
- Personnel "in the field" are frustrated because they don't have the data they need
- Fail to understand the rules to follow to get data
- Comparable to someone not having a degree to get a certain job done

Discussion on identifying tension points at statutory or regulatory in nature (continued):

- 5.h. Validation complexity: Associated to DFARS 252.204-7000
 - Release of information
 - Concerns about impacting freedom to use Intellectual Property
 - Need more efficient use and re-use of data
- 5.i. Embedded software (object code) vs. source code (human-readable)
 - Specific deliverable depends on what you want
 - Definitions don't need to be at policy level
 - What is DMPD as it pertains to O&M when talking about software?
 - Lines drawn differently for software compared to hardware
 - Recommend software sustainment be cited in 10 USC 2460
 - Maintaining software is different than maintaining hardware
 - Need to address encouraging companies to do dealings with government
 - Address in statute to have policy to address cyber and other activities
- 6.c. Lack of Trained Personnel
 - Attempt to pool necessary expertise
 - Very rare to find the necessary analytical skills in this area at local installations
 - 20 years ago, recommendation was to get better training in this area, however, not sufficiently accomplished
 - Template approach on industry for government proposals
 - Brief discussion on DoDI 5010.12, Manual on Intellectual Property
- 6.d. Data Assertion List (7017)
 - Effort to validate assertion list
 - Level of effort required in proposal phase of evaluation
- Commercial Item
 - Any time we use commercial item we need to be careful how it is defined

- Current commercial item IP information is difficult to navigate
 - Underlying structure but is not necessarily the same
- 7.a. Deferred Ordering
 - Requirement to collect data then you can use deferred ordering
 - Statement of work should state data should have a CDRL deliverable
 - Asking to deliver on CDRL under contract with appropriate marking
- 7.c. Deferred Ordering Part 1
 - Tension is adding or used after generated
 - Four things allow data delivery at later time: deferred ordering, priced contract option, escrow or delivery

Public Comment, Mr. Bill Decker, Defense Acquisition University

- Comment is in reference to 6.c. Lack of Training topic
- Looking for necessary expertise within organizations with knowledge inconsistent
- Judge Advocate General (JAG) officers don't always know current policy and procedures
- Subject Matter Experts (SMEs) would have a better opportunity to stay up to date
- Some thoughts to training recommendations:
 - One time training or recurring
 - Continuing education
 - Who needs it? Everyone in all career fields?
 - Something that should be done annually?
 - Currently engineering and science & technology career fields are required to do it

Discussion on Form, Fit, and Function Paper provided by Dr. Hamerlinck:

- What does high level mean? Change made to document
- Executable means what mission can read. Can have multiple modules compiled to one executable
 - Source code is usually trade secrets
- What is OMIT software data?
 - Same challenge as we have in OMIT
 - Lack of clarify between what is requirement and what is specification
- Need to ask DAR Council where the FAR definition for software comes from

Administrative closeout:

- No more public comments
- Will look at 2320 LILO Hard copy and try to start any rewrites on DFARs 227
- Need to have recommended changes in 2320 and 2321 with rationale

Notes from 14 December Session:

Panel conducted an admin session to ensure they were on the right path with main discussion points below:

- Need to understand that IP understanding greatly varies by command and location
- IP strategies tend to be risk averse and ask for everything
 - A broader knowledge continues to move across workforce in addressing IP earlier in the process
- Need to continue to push what programs need and not necessarily everything when it comes to data
- Sustainment across the board still seems to be a major issue

Panel began the process to assign tension points for written summaries and continued discussion:

- 4.a.ii. Indirect cost pools
 - Need to take IR&D out of the equation
 - Concerned about mid-tier and lower suppliers
 - New direction in FY17 NDAA on IR&D on page 729
 - Section 824 discuss split cost pools
 - Can't look at IR&D policy in a vacuum
 - Under IR&D there really isn't an opportunity cost
 - Costs reimbursed with progress payments or contract
 - IR&D topics starting after or shortly before contract award
- 2.b. Depot-level maintenance capability/requirements
 - Depot requirement is statutory
 - Statute mandates depot capability that effects cost on government and industry
 - Taxpayer issue of forcing things into depot than can be done at less cost
 - Currently, not sufficient enough work to do both
- 3.b. IP Valuation
 - If IP valuation is spot on, then can agree on terms in advance
 - IP valuation is based on judgement
 - IP valued as non-tangible asset and occurs during mergers and acquisition
 - IP is a return on investment decision
 - Write white paper on IP valuation/Indirect Costs (Branch/Elkington/Harris/Kyes)

Public Comment, Mr. Bill Decker, Defense Acquisition University

- Comment is in reference to IP Cost and Evaluation
- Teaching students to have a contractor bid an option on IP
- Statute does not require contractor to deliver any data at private expense
- Evaluation cannot be downgraded
- Business decision whether you accept something at any cost
- Opportunity cost for IR&D is not zero and need to have good people to do the research

Panel began the process to assign tension points for written summaries and continued discussion:

- 4.a.v. Commercial vs noncommercial items
 - Minor mods don't effect the regs right now for commercial items unless development
 - This becomes an issue with suppliers more than anything
 - Associated to funding risk and mandatory flow down of clauses when dealing with commercial items from a prime contract
 - Need to understand commercial software terms
 - Licensing vs government unique requirements
- Assignment of Tension Points occurred as laid out in Tension Point assignment summary document
 - Tension Point Title, Issue (Summary) Problem, Recommendation, Cross reference to other tension points
 - Recommendations should include to statutes and regulations (DFARs)
 - Assignments sent out by Friday
 - Goal is to have them complete by after the holiday

Next Meeting: continue identifying tension points for review, review 2320 and 2321 language and report format

APPROVED: PANEL CHAIR, MR. RICHARD T. GINMAN

